

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

RANDY STERN, Individually, and as
Administrator of the Estate of
Annette Monachelli,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

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Docket No. 2:14-cv-176

**DEFENDANT UNITED STATES' MOTION FOR A FINDING
OF CONTEMPT AND ORDERING PRODUCTION OF DOCUMENTS
AGAINST ECLINICALWORKS, LLC, AND MEMORANDUM IN SUPPORT**

Defendant United States of America (the "Government" or "Defendant") through its attorney Eugenia A.P. Cowles, Acting United States Attorney for the District of Vermont, hereby moves pursuant to Federal Rules of Civil Procedure 37 and 45 for an order finding eClinicalWorks, LLC ("ECW") in contempt, ordering production of responsive documents, and for such other relief as this Court deems just and necessary so as to discourage ECW and its counsel from engaging in similar discovery abuses in this and future litigations.

In support of this motion, the United States respectfully submits the following:

INTRODUCTION

ECW has a history of dodging its discovery obligations and was recently sanctioned by a Massachusetts court for discovery abuses. *Jensen v. EclinicalWorks, LLC*, 2012 WL 676225 (Mass. Sup. Feb 3, 2012), attached hereto as Ex. 1. In *Jensen*, ECW represented -- as it has here -- that it had no documents concerning customer complaints about its software. In imposing sanctions, Judge Wilkins found that: (1) "it is clear that ECW has refused to cooperate in good

faith” and that its “continued intransigence and lack of good faith cooperation” warranted not only ECW paying attorneys’ fees but also financing a forensic inspection of its servers, *id.* at *4, (2) ECW had “blocked this discovery long enough,” and (3) he did “not credit” an affidavit submitted by ECW’s CEO asserting that no responsive documents existed. *Id.* at *1. The present motion arises out of ECW employing the same obstructionist tactics in response to the Government’s subpoena. The Government requested, *inter alia*, documents relating to (1) similar customer complaints about the performance of ECW’s software, and (2) any litigations and/or arbitrations asserted against ECW alleging failures in ECW’s software. ECW’s assertion that it has no such documents is manifestly false.

By way of background, the present lawsuit arises out of the unfortunate passing of Plaintiff Randy Stern’s wife, Annette Monachelli, on February 5, 2013. She was forty seven years old. Plaintiff’s medical malpractice action alleges that Ms. Monachelli’s physician, Dr. Melissa Volanksy from the Stowe Family Practice (“SFP”), “failed to properly test or treat Ms. Monachelli, or appreciate the need for immediate diagnostic imaging to determine if Ms. Monachelli was suffering due to an internal bleed or aneurism.” Compl. ¶ 14 (Docket No. 1). It is the United States’ position that the relevant progress notes and documents produced by ECW, however, indicate that Dr. Volanksy did in fact order an MRA for Ms. Monachelli. Ex. 2, at p. 2¹ (indicating order was placed for an “MRA – HEAD W/ CONTRAST”); Ex. 3 (ECW technician stating that “D[iagnostic] I[mage] entry was available inside the progress note but when look into DI [tab] its not there”).

Therefore, at this stage it appears that the subject MRA order was not completed despite Dr. Volanksy having ordered it. The Government is thus investigating whether the MRA order

¹ Out of respect for Plaintiff’s and Ms. Monachelli’s privacy, the United States has redacted the personal information and personal health information relating to Ms. Monachelli contained in the progress note.

was not completed because of a failing in the electronic medical record (“EMR”) manufactured, licensed, and supported by ECW. Without question whether ECW’s software dropped the placed order or failed to populate the appropriate screens through which orders are communicated and tracked is a central issue in this litigation. Despite being a large privately held corporation with over \$315 million in annual revenue, other ECW’s users have encountered similar problems with its software. For example, as described in more detail *infra*, ECW users have alleged that ECW’s software contains a “dangerous error -- could result in patient death,” and that defects render it a “serious threat to the health and safety” of patients.

After a lengthy L.R. 7(a)(7) conference and additional time to allow ECW to search for and produce responsive documents ECW has again relied on what appears to be ECW’s stock litigation tactic: to simply deny responsive documents exist. This assertion is belied by the numerous documents the Government itself has uncovered; including, amongst other things, other lawsuits, customer complaints in on-line forums, and documents bearing ECW bates numbers produced in other litigations. Accordingly, the Government respectfully requests this Court: (1) enter an order finding ECW in contempt for failure to comply with the Government’s subpoena, (2) order ECW to immediately produce all responsive documents in its custody, possession or control, (3) grant such other relief the Court deems just and necessary so as to discourage ECW and its counsel from engaging in similar discovery abuses in this and future litigations.²

ARGUMENT

Pursuant to Rule 45 of the Federal Rules of Civil Procedure this Court is authorized to “hold in contempt a person who, having been served, fails without adequate excuse to obey the

² Judge Wilkins’ opinion in *Jensen* exposing ECW’s discovery violations appears to have had minimal deterrent effect.

subpoena.” Fed. R. Civ. P. 45(e). Rule 37 similarly provides that “a party may move for an order compelling disclosure or discovery” and that a “motion for an order to a nonparty must be made in the court where the discovery is or will be taken.” Fed. R. Civ. P. 37(a)(1)-(2).

I. ECW POSSESES AND SHOULD HAVE PRODUCED DOCUMENTS RESPONSIVE TO REQUEST NO. 3

Request No. 3 required ECW to produce:

Any and all documents concerning or relating to customer complaints of a nature similar or related to the failures here, which include missing orders, missing alerts, screens not populating properly and failures in the lab, x-ray, diagnostic imaging functions, and lab interface function.³

ECW has twice represented that it has no documents responsive to this request. Ex. 5, Ex. 6. The falsity of ECW’s contention is demonstrated by information and documents currently in the Government’s possession and readily available in the public domain.

A. ECW Must Possess Responsive Documents Given That A Federal Court Complaint Alleges That “Defects” In ECW’s Software Render It “A Serious Threat To Health And Safety”

In *Delaney v. eClinicalWorks*, No. 11-CV-04755 (E.D.N.Y. Sept. 9, 2011) a *qui tam*⁴ action was filed against ECW involving facts similar to the *Stern* matter. Germane to the issues here, the *Delaney* complaint alleged that “defects” in ECW’s software “render it fundamentally flawed” and “are a serious threat to the health and safety” Ex. 7, ¶ 7 (the “*Delaney* Complaint”). The *Delaney* action specifically alleged that “[p]atient information is missing throughout the system” *Id.* ¶ 47. As in *Delaney*, the Government is investigating whether

³ See Ex. 6. In the interests of brevity and clarity, this memorandum paraphrases the specific requests for documents at issue and attaches copies of the subpoena (Ex. 4) and ECW’s responses (Ex. 5, Ex. 6). While L.R. 26(d)(3)(B) requires supporting memoranda to include “a specific, verbatim listing of each discovery item sought”, due to the length of the requests and responses and the parties’ subsequent agreement to reword and limit certain requests the Government respectfully submits that this approach will ease the Court’s understanding of the issues.

⁴ While the *Delaney* Complaint indicates that it was filed under seal, the seal has since been lifted.

patient information (i.e., Ms. Monachelli's MRA order) was missing from the EMR provided by ECW to SFP.

During the L.R. 7 conference, the Government advised ECW's lawyers of the existence of the *Delaney* action; yet, ECW still asserts that it has no documents relating to that case or the underlying customer complaints. ECW's lawyers should have read the *Delaney* Complaint: an entire section is titled "**Several High-Level Individuals Have Expressed Concerns Regarding The Fundamental Flaws in the EHR System, but eClinicalWorks Refuses To Take Corrective Action.**" *Id.* at p. 22. Paragraph 8 specifically alleges that ECW's corporate managers "*are aware of the significant defects and flaws*" and that ECW has "resisted entreaties from pharmacists, physicians, and others involved in the system's implementation to fix the flaws." *Id.* at ¶8 (emphasis added); *id.* at ¶ 37 ("the NYC DOHMH notified ECW of the problem and tried to persuade ECW to correct the flaws").

Not only is ECW's position that the *Delaney* complaint appeared out of thin air refuted by the *Delaney* Complaint itself, but is also entirely illogical. According to ECW the *Delaney* complainant experienced life threatening failings in its EMR and yet never notified ECW or tried to have the problem fixed. ECW no doubt possesses a trove of documents relating to technical support tickets, and surely must have done its own technical investigation into what caused the error and how it was (hopefully) fixed. Moreover, ECW surely possesses additional customer complaints beyond the *Delaney* action.

B. ECW's Own Filings In Other Litigations Demonstrate That It Possesses Documents Relating To Customer Complaints About Its Software

In seeking to stave off sanctions for discovery abuses in *Jensen*, ECW argued it complied with the initial court order mandating production of customer complaints by declaring "ECW complied with this Court's Order by providing Plaintiffs with a CD containing over 6,000 pages

of documents, including *documents showing support and performance-related issues that were discussed with customers.*” Ex. 8, at p. 4 (emphasis added). One is left to wonder how ECW and its lawyers from a major international law firm could represent they have no documents relating to customer complaints after having made such an assertion in a separate legal filing.

Moreover, the Government possesses customer complaints that ECW itself has produced in other litigations. Ex. 9, at p. 4 (“Interfaces with lab and lab equipment have been another issue where we feel ECW is unable to provide adequate State regulatory compliance.”); *id.* at p. 8 (“Issues regarding eClinicalWorks: Their software does not meet CLIA regulations” with regard to labs). The egregiousness of ECW’s representations here is demonstrated by the ease in which the Government was able to itself acquire documents bearing ECW bates numbers that should have been produced.

C. Publicly Available Websites Include Numerous Customer Complaints About ECW’s Software, Including With Regard To Missing Patient Information

The failings in ECW’s software have not gone unnoticed by users who have taken to public forums to share their dismay and concerns about the public safety risks posed by ECW’s product. One posting on an eClinicalWorks user forum is even titled “Dangerous Error – Could Result in Patient Death.” Ex. 10 (discussing dangers caused by abnormal test results not appearing in red as they are supposed to in order to alert doctors). Another post discussed a doctor’s inability “to find the order and result for a MRI” and how “the original [MRI] order [I got the result, so there is an order] is not visible.” Ex. 11. A third example of a customer complaint about ECW’s software explicitly states that the user called ECW about the problem and includes the case numbers submitted. Ex. 12 (notably, Jennifer Moore of ECW responded to this user and stated that she “asked the team to investigate your issues and help you with a resolution”). Documents relating to these customer complaints, and others similar that the

Government has not yet itself uncovered, are directly responsive. ECW however has elected to “litigate rather than cooperate” and “nothing but further foot-dragging and narrow reading” of the subpoena requests can be expected. *Jensen*, 2012 WL 676225, at **3-4.

D. Customer Complaints Lodged With The Better Business Bureau Further Suggest That ECW Is In Possession Of Responsive Documents

Finally, a search of the Better Business Bureau shows numerous complaints related to ECW and “Problems with Product / Service.” Ex. 13. One complaint specifically indicates that the user has “nonworking software that is critical to patient care” and “various performance issues.” *Id.* Again, ECW’s position in connection with these types of complaints is a simple outright -- and demonstrably false -- denial of possession of such documents.

II. ECW POSSESES AND SHOULD HAVE PRODUCED DOCUMENTS RESPONSIVE TO REQUEST NO. 4

Request No. 4 required ECW to produce:

Any and all documents concerning or relating to any arbitration, litigation, civil, criminal, or regulatory investigation, inquiry and/or demand relating to alleged failings in eClinicalWorks software, and/or improper alteration, deletion, destruction, or modification of records.

ECW has twice represented that it does not have any documents responsive to Request No. 4. Ex. 5, 6. A Pacer search reveals otherwise. ECW has been sued in the following cases, each alleging failings in ECW’s software:

1. *Delaney v. eClinicalWorks*, No. 11-CV-04755 (E.D.N.Y. Sept. 9, 2011), Ex. 7, at ¶ 7 (alleging “defects” in ECW’s software “render it fundamentally flawed” and “are a serious threat to the health and safety . . .”);
2. *Jensen v. EclinicalWorks, LLC*, 2012 WL 676225 (Mass. Sup. Feb 3, 2012), Ex. 19, at ¶ 14 (alleging ECW’s “software does not perform the functions as advertised”); *id.* ¶ 17 (alleging ECW’s software “has never fully functioned as promised by ECW.”); and
3. *Houston Physicians Medical Assoc. v. eClinicalWorks, LLC.*, No. 4:05-cv-03945 (S.D. Tex. 2006), Ex. 14, at ¶ 4.7 (alleging “the dismal and completely unsatisfactory performance of the ECW System”).

Failure to produce documents relating to *Houston Physicians* is particularly noteworthy given that Keith Aurzada -- ECW's lawyer here -- was also counsel to ECW in that action. Ex. 14, at p. 9. Similarly, Mr. Aurzada knew of the *Jensen* matter given his involvement in the dispute prior to the filing of the complaint and his long time role as counsel to ECW. Ex. 15, at p. 1. At a minimum ECW must possess "documents relating to" the above litigations, including at least the customer service tickets submitted in attempting to resolve the alleged failings, legal demands, and ECW's own investigations into the alleged underlying problems with its software. Moreover, ECW contracts contain an arbitration provision which means that there very well may be numerous other documents responsive to this request that the Government was not yet able to readily find itself.

III. ECW HAS NO PROPER BASIS FOR REFUSING TO IDENTIFY FORMER EMPLOYEES THAT WORKED ON THE SOFTWARE USED BY SFP

Request No. 9 required ECW to produce "identification of software developers/engineers who have left ECW and who had either worked on SFP related projects, or were involved in developing the software product used by SFP (and others). This would include their name and last known contact information, as well as any resignation and/or termination letter." Ex. 6. Despite the Government having limited this request per ECW's prior objection, ECW "continues to object to the production of these documents" largely on the grounds that it is "not relevant or reasonably calculated to lead to the discovery of admissible evidence," and "overly burdensome." *Id.*

Request No. 9 is straightforward and designed to identify individuals who will ultimately be able to assist the parties and the Court in understanding some of the technical aspects of ECW's software. ECW has represented that the parties will be unable to understand some of the

data contained on SFP's servers. Consequently, the Government seeks the names and contact information of objective individuals who could provide important information highly relevant to this case. For a large company with \$315 million in annual revenues and an HR department this request should be anything but "overly burdensome."

IV. ADDITIONAL CONCERNS ABOUT ECW'S CONDUCT IN THIS LITIGATION

In light of concerns that ECW spoliated evidence and violated HIPAA by altering electronic medical records pertaining to Ms. Monachelli, SFP contacted ECW on December 11, 2014 requesting that it locate and send SFP the archival copy of Ms. Monachelli's progress note. *See* Ex. 16 (SFP employee stating "I am missing an order in the progress note" and inquiring "where is the original order?"). In response to this simple request an ECW technician -- on her own initiative and without approval or request by SFP -- "found the missing DI" within the EMR and "enabled it" thus altering the then current data in the medical records. *See* Ex. 16. This was the second time ECW had altered records at issue in this case. Ex. 3 (ECW technician stating that he "[f]ound D[iagnostic] I[mage] was given to the patient" and that he "successfully removed the DI."). ECW has never been authorized to alter any records at issue and should have strict policies in place to ensure locked medical records are never altered, particularly where those records are at issue in litigation and where ECW has been previously subpoenaed for records.

The Government called ECW's lawyers to ensure there was a litigation hold in place and that ECW's technicians knew not to alter records. On December 22, 2014, ECW's lawyer, Keith Aurzada, responded by accusing SFP of making "repeated requests" for ECW technical support to "modify and/or delete certain medical files and records," including on December 11 and 22, 2014. Ex. 17 (the "Aurzada Letter"). The Government investigated the accusation, found it to

be false and conducted a conference call with Mr. Aurzada to address the matter. Mr. Aurzada conceded that his letter was “misleading” and that he had no knowledge of anyone from SFP requesting any records at issue be altered. *See* Ex. 18. Mr. Aurzada further admitted that the “request to delete was for an unrelated record” that had nothing to do with Ms. Monachelli and in fact dealt with a “test” patient, i.e. not a real person. *Id.* Thus, Mr. Aurzada fabricated his accusation by combining one request (December 11th) for an archival copy of Ms. Monachelli’s progress note -- which in no way sought any record be altered -- with another request (December 22nd) that “was for an unrelated record” and had nothing to do with Ms. Monachelli or this case. *See id.* While this issue is unrelated to the discovery requests at issue, the Government submits that it is emblematic of ECW’s approach to litigation.

CONCLUSION

WHEREFORE, the Government hereby respectfully requests the following relief:

1. That this Court enter an Order finding ECW in contempt for failure to comply with the Government’s subpoena;
2. That this Court further Order that ECW immediately produce all documents in its custody, possession or control that are in any way responsive to the Government’s subpoena; and
3. That this Court grant such other relief it deems just and necessary so as to discourage ECW and its counsel from engaging in similar discovery abuses in this matter and in future litigations.

Dated at Burlington, in the District of Vermont, this 4th day of March, 2015.

Respectfully submitted,

UNITED STATES OF AMERICA

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